(3)

FILED
NOV 2 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES BASTEK, RUSSELL KOWAL, CHRISTOPHER PAWELSKI and MICHAEL PILLMEIER, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

FEDERAL CROP INSURANCE CORPORATION and DAN GLICKMAN, solely in his capacity as Secretary of Agriculture,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

MARTIN R. GOLD
Counsel of Record
ROBERT P. MULVEY
GOLD, FARRELL & MARKS, LLP
Attorneys for Petitioners
41 Madison Avenue
New York, New York 10010
(212) 481-1700

21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 6

TABLE OF AUTHORITIES

Citation **Page**

Bowen v. New York, 476 U.S. 467, 106 S. Ct. 2022 (1986) 4

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583 (1970) 4

Davis v. U. S., 495 U. S. 472, 110 S. Ct. 2014 (1990) 5

FCIC v. Merrill, 332 U.S. 380, 68 S. Ct. 1 (1947) 5

Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 76 S. Ct. 349 (1956) 4

United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463 (1941) 5

Statutes and Regulations

Federal Crop Insurance Act, 7 U.S.C.

§1502(a) 1

§1508(b)(2)(A)(i) 5

§1508(j)(2)(A) 4

§6992(d) 4

§6999 4

Citations **Page**

7 C.F.R. Part 780 Appeal Regulations

§780.2(a)(1) 2

(iii) 2, 3

(iv) 2, 3

§780.2(c) 2, 3, 4

§780.2(d) 2, 3, 4

§780.2(e) 3, 4

§780.6 3

§780.7(e) 3

REPLY BRIEF FOR PETITIONERS

Petitioners, on behalf of themselves and all others similarly situated, respectfully submit this Reply Brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

ARGUMENT

The Solicitor General, in his brief on behalf of the agency-respondents, agrees with petitioners (the "Farmers") that the statutory and regulatory provisions governing the federal crop insurance program must be construed to give effect to the Congressional intent. That intent, as the Solicitor acknowledges, has remained unaltered in the sixty years since the original enactment of the Federal Crop Insurance Act -- "improving the economic stability of agriculture through a sound system of crop insurance," 7 U.S.C. §1502(a).

According to the Solicitor General, however, the statutory and regulatory framework provides no avenue for redress, either through the National Appeals Division ("NAD") of the Department of Agriculture, or in the courts, when the agencies adopt impermissible policies that are generally applicable to entire classes of farmers. He suggests that petitioners might seek relief in Congress. The Solicitor argues that class-wide relief to redress policy decisions is not available in the courts until each farmer who is effected by a policy has individually exhausted all appeals through the NAD. These appeals will be dismissed at each level because the NAD has no jurisdiction to review matters of general applicability. Nevertheless, through a tortured and serpentine exegesis of the statutes and regulations that drains statutory language of otherwise clear meanings, freely alters the purpose and scope of statutory provisions, and finally collapses on a contradictory construction of regulations, the

Solicitor argues that this is the Byzantine structure created by Congress.

The Solicitor's construction of 7 C.F.R. Part 780 entitled "Appeal Regulations"[1] addresses these regulations on behalf of respondents for the first time in this action. Neither the district court nor the Court of Appeals had these regulations before them when they rendered their decisions.

Section 780.2, entitled "Applicability", broadly provides at subsection (a)(1) that "this part applies to decisions made under programs and by agencies, as set forth herein: . . . (iii) Decisions made by personnel of the Federal Crop Insurance Corporation ("FCIC") or FSA [Farm Service Agency] with respect to contracts of insurance insured by FCIC and the noninsured crop disaster assistance program; (iv) Decisions made by personnel of FCIC or FSA with respect to contracts of insurance provided by private insurance carriers and reinsured by FCIC under the provisions of the Federal Crop Insurance Act."

The Solicitor argues that the phrase "under this part" somehow internally limits the scope of §§780.2(c), as well as the scope of 780.2 (d) which bars appeals based solely on the application of mathematical formulas such as those challenged by the Farmers, to what the Solicitor has styled "the informal intra-agency review procedures" governed by Part 780. (Respondents' Br. at 11). This constricted interpretation, for

---

[1] Petitioners reproduced subdivisions (a)(1)(iii) and (iv) and subdivisions (c), (d) and (e) of §780.2 of the Appeal Regulations in the Appendix to their Petition. In light of the arguments that have now been raised by the Solicitor, the full text of Part 780 is reproduced in an Appendix to this Reply Brief.

which the Solicitor provides no basis, is completely at variance with §§780.2(iii) and (iv) which clearly state that the Appeal Regulations apply to all decisions made under programs and by agencies, including FCIC, with respect to contracts of insurance issued by the FCIC or private carriers reinsured by the FCIC -- the types of claims for indemnities raised by the Farmers.

It is under the very same regulation, §780.2(c), that farmers are prohibited from even seeking "reconsideration or appeal" from any "general program provision", "program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants." Subsection 780.2(e), which the Solicitor does not address, also makes clear that class-wide remedies or appeals are not permitted: "(e) Only a participant may seek reconsideration or appeal under this part."

Directly following a later provision, §780.6, which creates voluntary alternative avenues for dispute resolution including mediation, is subdivision 780.7(e) upon which the Solicitor relies. It provides that "Nothing in this part prohibits a participant from filing an appeal of a final decision of the county committee or the Regional Service Office with NAD in accordance with the NAD regulations." The Solicitor argues that this subdivision somehow preserves the Farmers' right to file administrative appeals from any decision, including matters of "general applicability", despite the express language in 780.2(c), (d) and (e) to the contrary. However, the clear purpose of this subdivision is to provide that since mediation is voluntary, a claimant, whose right to administrative review is not otherwise foreclosed by §§780.2(c), (d) or (e), may forego mediation and directly proceed before the NAD with formal appeals. It makes no sense to interpret this subsection to permit appeals which are otherwise expressly prohibited by the same regulations.

In sharp contrast to the Solicitor's construction of the statutory and regulatory framework, the Farmers' position that there is direct resort to the district courts for systemic challenges to agency policy is consistent with §§780(c), (d) and (e), with 7 U.S.C. §6992(d) which disallows appeals from matters of "general applicability," and from the existence of a separate jurisdictional statute, 7 U.S.C. §1508(j)(2)(A). The Farmers' interpretation thus harmonizes and gives full effect to all of the statutory provisions and regulations and leaves no provision inconsistent or without purpose. See, e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250, 90 S. Ct. 1583, 1592 (1970); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285, 76 S. Ct. 349, 359 (1956). The Farmers' position is also in accord with this Court's construction of a similar statutory framework in the context of Social Security. Bowen v. New York, 476 U.S. 467, 106 S. Ct. 2022 (1986) (Respondents' Br. at 13 n.6). There, the Court recognized that exhaustion of administrative remedies is required, but does not bar judicial review of system-wide challenges to policy decisions that undermine Congressional intent.

The Solicitor gratuitously denominates the separate jurisdictional provision, 7 U.S.C. §1508(j)(2)(A), as a venue provision (Respondents' Br. at 11), ignoring the fact that it was the sole jurisdictional provision contained in the Federal Crop Insurance Act from 1938 until 1994. In that later year, the Reform and Reorganization Acts created the NAD and added a separate provision conferring jurisdiction on the district courts to entertain appeals after administrative exhaustion, 7 U.S.C. §6999. At the same time, Congress reenacted §1508(j)(2)(A), providing for direct review to the district courts from adverse crop insurance determinations without first pursuing administrative appeals. The Solicitor's argument that when this statute was reenacted it somehow

became merely a venue provision, is illogical. See, Davis v. U.S., 495 U.S. 472, 482, 110 S. Ct. 2014, 2021 (1990).

Finally, the Solicitor argues that challenges to policy should be addressed to Congress, and that the Farmers received all of the insurance to which they were entitled for their modest administrative fee. However, the Farmers are not seeking windfall indemnities; they request only the coverage explicitly mandated by Congress. The Act itself contains the applicable mathematical formula: "coverage for a 50 percent loss in yield . . . indemnified at 60 percent of the expected market price, 7 U.S.C. §1508(b)(2)(A)(i). Instead of applying the statute as written, the FCIC has imposed calculations that undermine the Congressional intent, and leave crop insurance an "investment in disappointment." FCIC v. Merrill, 332 U.S. 380, 387-88, 68 S. Ct. 1, 5 (1947) (Jackson, J. dissenting). See also, United States v. Hutcheson, 312 U.S. 219, 239, 61 S. Ct. 463 (1941) (legislation should not be construed in a "spirit of mutilating narrowness").

The severe weather conditions and natural disasters afflicting American farmers during the 1998 growing season are well known. The Court of Appeals' decision in this case will effectively preclude judicial review of policy determinations by the respondents governing the adjudications of crop insurance claims which will surely be filed by thousands of farmers. Congress clearly did not intend to allow the respondents to depart from the governing crop insurance statutes without judicial review, and this Court should not leave the law in this posture.

CONCLUSION

This Court should grant certiorari to review the decision of the Court of Appeals which is contrary to the crop insurance statutes and makes review of matters involving FCIC policy and procedure a costly exercise in futility.

Alternatively, this Court should grant certiorari, vacate the decision below, and remand for further consideration in light of 7 C.F.R. §§780.2(c), (d) and (e), which were not considered by the Court of Appeals.

Dated: New York, New York
November 2, 1998

Respectfully submitted,

MARTIN R. GOLD
Counsel of Record

GOLD, FARRELL & MARKS, LLP
41 Madison Avenue
New York, New York 10010
(212) 481-1700

Attorneys for Petitioners

Of Counsel:

Martin R. Gold
Robert P. Mulvey

APPENDIX

APPENDIX A — RELEVANT REGULATIONS

7 C.F.R. CH. VII, PART 780 — APPEAL REGULATIONS

§ 780.1 Definitions.

For purposes of this part:

1994 Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Public Law 103-354).

Agency means FSA and its county and State committees and their personnel, CCC, NRCS, FCIC, and any other agency or office of the Department which the Secretary may designate, or any successor agency.

Appeal means a written request by a participant asking the next level reviewing authority to review a decision.

CCC means the Commodity Credit Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

County committee means an FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

FCIC means the Federal Crop Insurance Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

Appendix A

Final decision means the program decision rendered by the county or State committee or the FCIC Regional Service Office upon written request of the participant. A decision that is otherwise final shall remain final unless the decision is timely appealed to the State committee or NAD. A decision of FSA or FCIC made by personnel subordinate to the county committee is considered "final" for the purpose of appeal to NAD only after that decision has been appealed to the county committee under the provisions of this part.

FSA means the Farm Service Agency.

NAD means the National Appeals Division, established pursuant to the 1994 Act.

NAD regulations means the National Appeals Division (NAD) rules of procedure published by the Secretary at 7 CFR part 11 implementing title II, subtitle H of the 1994 Act.

NRCS means the Natural Resource Conservation Service of the United States Department of Agriculture, formerly the Soil Conservation Service.

Reconsideration is a subsequent consideration of a prior decision by the same reviewing authority.

Regional Service Office means the regional offices established by FSA and FCIC for the purpose of making determinations for private insurance companies reinsured by FCIC under the Federal Crop

Appendix A

Insurance Act and for FSA for insurance contracts delivered through county FSA offices (including underwriting decisions), the applicability of provisions under chapter IV of 7 CFR, and decisions as to insurability, and rating of acreage.

Reviewing authority means a person or committee assigned the responsibility of making a decision on the appeal filed by the participant in accordance with this part.

State committee means an FSA State committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)) including, where appropriate, the Director of the Caribbean Area FSA office for Puerto Rico and the Virgin Islands.

Technical determination of NRCS means a decision by NRCS concerning the status and condition of the natural resources based on science and on the best professional judgment of natural resource professionals within NRCS.

§ 780.2 Applicability.

(a)(1) Except as provided in other regulations, this part applies to decisions made under programs and by agencies, as set forth herein:

(i) Decisions in those domestic programs administered by the Farm Service Agency (FSA), and programs administered by FSA on behalf of the

Commodity Credit Corporation (CCC) through State and county committees, which are generally set forth in chapters VII and XIV of this title;

(ii) Technical decisions made by the Natural Resources Conservation Service (NRCS) under title XII of the Food Security Act of 1985, as amended;

(iii) Decisions made by personnel of the Federal Crop Insurance Corporation ("FCIC") or FSA with respect to contracts of insurance insured by FCIC and the noninsured crop disaster assistance program;

(iv) Decisions made by personnel of FCIC or FSA with respect to contracts of insurance provided by private insurance carriers and reinsured by FCIC under the provisions of the Federal Crop Insurance Act; and

(v) Other programs to which this part is made applicable by individual program regulations.

(2) For covered programs, this part is applicable to any decision made by FSA and its State and county committees, CCC, FCIC, the personnel and agents of FSA, FCIC, or CCC, and by the officials of NRCS (to the extent provided in § 780.9), except as otherwise may be provided in individual program requirements or by the Secretary.

(3) This part is not applicable to any decision:

(i) Made by FSA or FCIC with respect to any matter arising under the terms of the Standard

Appendix A

Reinsurance Agreement between FCIC and any private insurance company reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended; or

(ii) Made by any private insurance company with respect to any contract of insurance issued to any producer by the private insurance company and reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. Those insurance contracts are subject to dispute resolution through arbitration or mediation in accordance with the contract terms.

(b) With respect to matters identified in paragraph (a) of this section, participants may request reconsideration or appeal, under the provisions of this part, of decisions by an agency made with respect to:

(1) Denial of participation in a program;

(2) Compliance with program requirements;

(3) Issuance of payments or other program benefits to a participant in a program;

(4) Making payments or other benefits to an individual or entity who is not a participant in a program; or

(5) Technical determinations by NRCS.

(c) No reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants.

(d) Mathematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas, are not appealable under this part.

(e) Only a participant may seek reconsideration or appeal under this part.

§§ 780.3—780.5 [Reserved]

§ 780.6 Mediation.

Participants have the right to seek mediation involving any decision appealed under this part in accordance with the provisions of section 282 of the 1994 Act, if the mediation program of the State where the participant's farming operation giving rise to the decision is located has been certified by the Secretary for the program involved in the agency decision. Any time limitation for review contained in this part will be stayed pending timely pursuit and completion of the mediation process.

Appendix A

§ 780.7 Reconsideration and appeals with the county and State committees and reconsideration with the regional service offices.

(a) A participant may appeal a decision of personnel subordinate to the county committee by filing with the county committee a written request for appeal that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program policies; or

(2) All material facts were not properly considered in such decision.

(b) A participant may seek reconsideration of a final decision by a county committee or the Regional Service Office by filing a written request for reconsideration with the county committee or the Regional Service Office that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(c) A participant may appeal a final decision by a county committee or the Regional Service Office to the State committee and request an informal hearing

in connection therewith, by filing a written appeal with the State committee.

(d) A participant may seek reconsideration of a decision by a State committee, and request an informal hearing in connection therewith, by filing a written request for reconsideration with the State committee that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(e) Nothing in this part prohibits a participant from filing an appeal of a final decision of the county committee or the Regional Service Office with NAD in accordance with the NAD regulations.

(f) This section does not apply to a technical determination by NRCS. Procedures regarding the appeal of a technical determination by NRCS are contained in § 780.9.

§ 780.8 Time limitations for filing requests for reconsideration or appeal.

(a) A request for reconsideration or an appeal of a decision shall be filed within 30 days after written notice of the decision which is the subject of the

request is mailed or otherwise made available to the participant. A request for reconsideration or appeal shall be considered to have been "filed" when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked. A decision shall become final and non-reviewable unless reconsideration is timely sought or the decision is timely appealed.

(b) A request for reconsideration or appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) of this section if, in the judgment of the reviewing authority with whom such request is filed, the circumstances warrant such action.

§ 780.9 Appeals of NRCS technical determinations.

(a) Notwithstanding any other provision of this part, a technical determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as amended, including wetland determinations, may be appealed to a county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal and agrees with the participant's appeal, the county committee shall refer the case with its findings to the NRCS State Conservationist to review the matter and review the technical determination. The County or State committee decision shall incorporate, and be

based upon, the NRCS State Conservationist's technical determination.

§ 780.10 Other finality provisions.

The finality provisions contained in section 281 of the 1994 Act shall be applied to appeals under this part to the extent provided for in that section of the 1994 Act.

§ 780.11 Reservations of authority.

(a) Representatives of FSA, FCIC, and CCC may correct all errors in entering data on program contracts, loan agreements, and other program documents and the results of the computations or calculations made pursuant to the contract or agreement.

(b) Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Manager of FCIC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by FSA or its county and State committees, FCIC, or CCC.

EFFECTIVE DATE NOTE: Part 780 was revised at 60 FR 67316, Dec. 29, 1995, effective January 16, 1996. For the convenience of the user, the text remaining in effect until January 16, 1996, is set forth below.